Enforcement of Secrecy Agreements

I. Prosecution of Secrecy Violations Under Various Criminal Statutes.

Introduction

The sections of U.S. Code discussed below include those which could be used to prosecute violations of release of secret information and general material of interest to the national defense.

Two of these sections are generally known as the espionage laws. Prosecution under these sections is limited to those violations which take place within the United States or its maritime jurisdiction. Thus, they cannot be used to prosecute a violation which takes place overseas whether it be by a citizen or a foreign national. The important element then, is where the violation took place and the place where a secrecy agreement was entered into is not significant.

There is one section of the U.S. Code not included in the same chapter as the espionage sections, but rather part of the Internal Security Act of 1950, which could have extraterritorial affect. If this is so, then a secrecy agreement could be used under this section as evidence of knowledge on the part of the defendant that the information was "classified" as required by the section.

A. Sections With Limited Jurisdiction, 18 USC 793, 794 and 798.

The following sections are part of chapter 37, U.S. Code. They are collectively known as the Espionage Laws and include sections 791 through 798 of Title 18. This chapter is limited in its jurisdiction by section 791 which states:

> "This chapter shall apply within the admiralty and maritime jurisdiction of the United States and on the high seas, as well as within the United States."

This in turn was derived from chapter 30, Title 1, section 8, June 15, 1917, which stated,

> "The provisions of this title shall extend to all Territories, possessions, and places subject to the jurisdiction of the United States whether or not contiguous thereto, and offenses under this title when committed upon the high seas or elsewhere

within the admiralty and maritime jurisdiction of the United States and outside the territorial limits thereof shall be punishable hereunder."

It is quite clear that section 791 limits the jurisdiction of the subsequent sections in the chapter to acts committed in the United States and within the admiralty and maritime jurisdiction of the United States. Thus, an offense as described below occurring in a foreign country could not be prosecuted.[1]

18 USC 793(a) (b) (c) An offense under these sections has the following elements:

(1) defendant may be anybody, citizen or alien

(2) a necessary element of the offense is "intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of any foreign nation."

(3) prohibited acts include the collection, copying and receipt of "anything connected with the national defense" and entry into "places connected with the national defense."

793(d) (1) lawful possession by the defendant of

(2) information in any form "relating to the national defense", and which he "has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation" and,

(3) willful communication of such information to "any person not entitled to receive it" or willful retention on demand that it be returned to the Government.

(NOTE: One difference in the requirements of 793(d) with those of 793(a),(b) and (c) is that (d) refers to information which the possessor has reason to believe could be used, whereas parts (a),(b) and (c) refer to objects or information which the possessor has reason to believe is to be used to the injury of the United States. In addition, of course, part (d) refers to the communication of information of which defendant has lawful possession whereas parts (a), (b) and (c) refer to obtaining information illegally.)

1. The Department of Justice is considering an amendment to this section which would remove the territorial limitation. They have taken the position apparently only for tactical reasons with expectation of a case on this point, that sec. 791 in effect does not mean what it says, but would include overseas violations. It is very doubtful that this interpretation would be accepted by a court.

793(e) Provisions the same as in part (d), but pertaining to unlawful possession of information by the defendant as distinguished from lawful possession. An affirmative duty to return the information to the Government, without demand is imposed and its breach is an offense.

793(f) (1) lawful possession by the defendant of

(2) documents or information relating to the national defense, and

(3) a. unauthorized removal of same from its place of custody, or delivery to anyone in violation of the defendant's trust which he permits through his gross negligence, or

b. knowledge that the removal or delivery has taken place and failure to make prompt report to his superior officer.

793(g) "If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy."

18 USC 794(a) (b) The following elements are necessary in the violation of this section:

(1) communication to any foreign government or faction thereof of

(2) information relating to the national defense

(3) "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation."

(NOTE: This differs from section 793(d) which also deals with information generally, in that the defendant need not have lawful possession of the information. Also he must have reason to believe that it is

to be used to the injury of the United States rather than could be so used.)

794(c) (1) collection or communication to anyone in time of war of

(2) "information relating to the public defense which might be useful to the enemy"

(3) "with intent that same shall be communication to the enemy of"

794(d) (Conspiracy provision.)

18 USC 798(a) (1) Prohibited acts are communication to an unauthorized person, publication, or "use in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States."

(2) Protected material is classified information of a COMINT nature.

(3) Defendant must "knowingly and willfully" do the act.

798(b) (Definitions.)

"classified information" - which, at the time of violation is, for reasons of national security specifically designated by a United States Government Agency for limited or restricted dissemination or distribution.

"unauthorized person" - any person who, or agency which, is not authorized to receive COMINT information by the President or by the head of an agency expressly designated by the President to engage in COMINT activities.

798(c) "Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the United States of America or joint committee thereof."

B. Statute With Possible Extraterritorial Effect, 50 USC 783(b).

Title 50 USC 783(b) is a section of the Internal Security Act of 1950 and thus is not within the jurisdictional limitation imposed

by section 791 of Title 18 USC. In fact there is no mention of territorial jurisdiction in the Internal Security Act itself and particularly none with reference to this section. Several Supreme Court cases indicate that when no explicit limitation is present, an extraterritorial effect can be inferred by the nature of the offense. Therefore, if the reasoning in these cases applied to this type of crime, this section could be used to prosecute secrecy violations which took place overseas, if the situation met the other requirements of the section. Therefore, if the section can be applied, then a secrecy agreement with a violator could again serve as evidence of his knowledge and presumed intent.

1. 50 USC 783(b) The following are essential elements of an offense under this section.

   (1) unauthorized communication by "any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof."

   (2) to "any other person" whom

   (3) "employee knows or has reason to believe to be a foreign government's agent or a member of any communist organization."

   (4) of information . . . classified . . . as affecting the national security" and knows or has reason to know that such information has been so classified.

   (NOTE: It is probably not necessary that the recipient be actually an agent or communist so long as the employee has reason to believe and does believe he is when the information is communicated.)

2. There is no indication that the above described section is limited in its effect to areas within United States jurisdiction. In the absence of an explicit limitation similar to section 791 of Title 18 discussed in Part A, the general rule is that a government cannot punish crimes committed outside its territorial jurisdiction. However, there are several qualifications to this general principle.

If jurisdiction is not explicity limited, the courts will infer that Congress intended certain types of crimes to be punished no matter where committed. The leading case expressing this principle is United States v. Bowman.[2] The offense in this case was defrauding a U.S. Government corporation. The indictment enumerated several fraudulent acts which were committed in varying locations including a ship at sea and Argentina. The lower court held the indictment bad for lack of jurisdiction over the crime. In reversing this decision, Chief Justice Taft first explained the general rule concerning the territorial limitations upon the power of a government to punish crimes. He pointed out that this limitation applied particularly to crimes against private individuals or their property and which would generally affect the peace and good order of the community, such as murder, arson, larceny and frauds of all kinds. He assumes that in the absence of an explicit statement, Congress does not intend to punish these crimes if committed outside United States territory. However, he goes on to distinguish crimes against the Government itself as follows:

> "But the same rule of interpretation should not be applied to criminal statutes, which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction or fraud, wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction, would be greatly to curtail the scope and usefulness of the statute, and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense."[3]

It can be argued that an unauthorized disclosure as described in section 783(b), Title 50 is a case which demands even more concern than defrauding the Government. If the Government can punish crimes against it committed outside its territory in the nature of fraud, then surely it should be

2. 260 US 94 (1922)
3. 260 US 94,98

able to reach those engaged in compromising the nation's secrets no matter where the act took place. There is no reason to suppose that Congress did not mean to include those Government employees who happened to be working overseas. In fact the opportunity of engaging in espionage and passing secrets is fully as great if not greater abroad than at home.

If this argument is accepted, what effect would it have on employees of CIA and its cover corporations? Under the language of the section they would be subject to it. One difficulty arises in the various shadings of proprietary ownership. The language of the section speaks of owning a major part of the stock, so it is conceivable that a corporate employee would be covered if only a majority of stock was owned by the Agency, and not covered if we provided 100% subsidy but owned no stock.

3. There is also the problem of this section's effect on a foreign national who is employed by the Government or a cover corporation overseas. It is arguable that he also would be subject to the section, especially if he has signed a secrecy agreement indicating his knowledge of the nature of the enterprise and the information. Strong support for this argument is available in the Bowman case cited above. The defendants in that case were three Americans and one British citizen. Although the British subject could not be found for the trial, no mention was made of the possibility that he should be treated differently from the rest. Apparently, Chief Justice Taft considered the foreign national as much subject to U.S. jurisdiction as the American nationals, although he chooses to speak in terms of "citizens". Logically there is as little reason to make the distinction in an espionage case as in one of fraud. However, a distinction might be made on the ground that espionage is close to a political crime and thus without the reach of American law if performed abroad by a non-citizen.

C. Extradition.

Assuming that one of the above statutes applied to a case of unauthorized disclosure either here or abroad, what would be the possibilities of securing extradition of a violator, resident in a foreign country? This would depend completely on the extradition treaty in force with that country. In most cases there would be little chance of success, for this type of crime has not been one of those covered by several of the more important treaties. Even those which do not limit the crimes, such as the convention in force with the Latin American countries[4],

4. Montevideo Convention on Extradition, Dec. 26, 1933, 49 Stat. 3111, T.S. No. 882

require that the crime be considered as such in both countries. It is unlikely that many countries would consider espionage against the United States a crime under their code. If the subject happened to be a national of the extraditing country, it is most unlikely that a treaty would apply.

However, a situation may arise in which Germany, for instance, may consider a compromise of what are essentially U.S. secrets, as a crime against Germany because of the common defense concept of the NATO treaty.

D. Prosecution Under Military Law.

The applicability of military law to CIA employees and agents abroad should be considered in some areas. There is no section in the Uniform Code of Military Justice which directly concerns this problem. The closest is 40 USC, section 698 (Article 104) entitled Aiding the Enemy. One problem in using this section is identifying an enemy in peace time. Thus, it is doubted that this would be helpful for civilian employees of the military.

II. The Possibility of Enjoining a Threatened Breach of a Secrecy Agreement.

A. Introduction

In certain circumstances it is possible that a court would grant an injunction to prevent a threatened breach of a secrecy agreement. Such an injunction would be especially valuable where a past employee is threatening to release information which would embarrass the operations of the Agency. Obtaining such an injunction could have the effect of formalizing the issue so that it would be clear to the person involved that any further action on his part would result in contempt of court and a jail sentence. The hope would be that he would then consider his action more carefully than if the resulting punishment remained vague.

Of course this approach would not be of particular value in cases where the person was intentionally engaging in espionage. But it could be useful, for instance, in cases where a past employee is considering publishing a book, wants to release information out of spite, is chronically careless, etc.

B. Legal Problems Involved.

1. Validity of the agreement.

In order to enjoin a breach of contract the contract, of course, must be a valid one. It is assumed that a court would look upon a secrecy agreement made as a condition of employment as an enforceable contract and not void as against public policy. It is questionable whether termination secrecy

agreements would be enforced because of lack of consideration. Thus, we would rely on the secrecy agreement signed as a condition of employment.

2. Importance of place of execution of agreement.

Unlike its unimportance in a criminal prosecution, the place where the secrecy agreement is entered into is very important. It will usually determine what law will apply. If the agreement were made in the United States, there is a good chance that an injunction would be issued in any jurisdiction. If, however, the agreement was made abroad there would be a problem of conflict of laws. Whether or not an American court would look to the foreign law in such a case would depend on the circumstances.

If an injunction had to be obtained abroad there would be additional problems. For instance, civil law countries do not have injunctions as such, and there may be no appropriate remedy for circumstances similar to those outlined above.